IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 12 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

and

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
   Yes.

2. To be referred to the Reporter or not? Yes except [ ] portion.

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
   No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
   No

5. Whether it is to be circulated to the Civil Judge? :No

MAGAN BIJAL KOLI

Versus

STATE OF GUJARAT

Appearance:

MR JITEN M BUDHBHATTI with MR HM CHINOY for Petitioner

MR KC SHAH, APP for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH

and

MISS JUSTICE R.M.DOSHIT

Date of decision: 28/03/2000

ORAL JUDGEMENT [Per M.S. Parikh, J.]

1. The present conviction appeal arises from the impugned judgment and order dated 25/9/1987 rendered by

the Ld. Addl. Sessions Judge, Morbi in Sessions Case No. 14 of 1987. The appellant herein, described as 'the accused', came to be convicted and sentenced for the offence punishable u/S. 302 of the Indian Penal Code (for short 'IPC') and directed to suffer life imprisonment and to pay fine of Rs.100/-, in default to undergo further sentence of two months.

[2. It would appear from the communication dated 15/3/2000 addressed by the concerned Jail Authority, Rajkot District Jail, to the Deputy Registrar of this Court that the accused was set at liberty upon he having undergone the sentence coupled with the remission which he got under the notification of His Excellency the Gonvenor on accountof Golden Jubilee Year of Independence being 1997. This comunication was addressed by the concerned jail authority on accountof the order dated 7/3/2000 passed by this Court intimating the accused in the jail. Under such circumstances, Mr. J.M. Budhbhatti was requested to render legal assistance to the cause of the accused in this appeal. We have accordingly heard him as well as Ld. APP for the purpose of finally disposing of this appeal.]

3. The facts of the prosecution case which have been read by the learned advocate from the FIR exh. 52 : The accused's brother Vaghji Bijalbhai gave his complaint/FIR at 18.15 hours on 10/2/1987, day of incident to the effect that he has been residing with the members of his family at village Anandpar, Taluka Tankara and has been serving as temporary watchman in the Forest Department. Satabhai is his eldest brother. Maganbhai is younger to him. Keshubhai is younger to Maganbhai and the complainant is younger to him. Manubhai is younger to complainant. The complainant, his brother Maganbhai (accused) and Manubhai have been residing in the houses built in the respective fields in village Anandpar. His parents have been residing with his brother Manubhai. Accused Maganbhai was residing separately from the complainant. The three houses respectively occupied by them are situated in the same field in one line.

His brother Maganbhai, the accused herein, has also been serving in the Forest Department as a watchman. His monthly salary has been around Rs.700/- to Rs.800/and since he was not giving money at home (his wife Radhuben), there were frequent quarrels in the family. His father was also scolding him. Even during the course of the month when he received his salary, he did not pay any amount of the salary at home (to his wife). This resulted into quarrel between the husband and wife

(accused and his wife Radhiben - since deceased). At about 1 O'clock in the afternoon the complainant returned home from his service and when he was about to take his lunch, he heard quarrel in the neighbouring house of the accused and soon the accused's son Ghogho rushed to him while seeking his help saying that his father was beating his mother with knife. The complainant, therefore, immediately rushed to the house of his brother Maganbhai, the accused herein, when he saw the accused coming out in the open space in front of his house with knife in his hand. His father Bijalbhai also rushed to the house of the accused and upon stopping the accused, the accused also gave knife blows on the waist of his father with the result that his father fell down. Upon trying to apprehend the accused, the accused had also shown knife to him and escaped. Upon going into the house he saw his brother's wife Radhuben (accused's wife) lying in bleeding condition and found her dead. Thereafter coming out of the house he also found his father dead. He was left in a frightened condition. Thereafter, getting composed he walked down the distance upto Rav Sadan and then went by a truck to Tankara Police Station located in sub-district Morbi district Rajkot.

4. Upon receipt of the aforesaid complaint, P.S.I. Mr. Rathod, the concerned police officer, registered the offence and entered the investigation. He went to the scene of offence, drew the Panchnamas including inquest Panchnamas and scene of offence Panchnama, recorded the staements of the witnesses and finding the accused available, apprehended him. The Muddamal knife was discovered at the instance of the accused and discovery Panchnama was drawn. As the knife was apparently stained with blood, it was sent for its examination by the expert alongwith blood samples of the deceased persons, injured Ranjanben (child witness), blood stained clothes and the blood stained earthern portion taken from the scene of offence. Statements of one Dhirubhai, Rahemanben and Osmanbhai were also recorded. At the conclusion of the investigation and upon submission of the charge-sheet, the case was committed to the Sessions Court.

5. The accused pleaded not guilty at the trial. Upon appreciation of the evidence and after hearing the arguments of the Ld. Advocate for the accused and the Ld. Addl. Sessions Judge, the trial Court rendered conviction and sentence as aforesaid. The accused is accordingly before this Court in this appeal.

[6. The prosecution examined following witnesses at the trial :-

P.W. 1 Dr. Ramprasad Rasiklal Agrawal, Exh.5, who performed post mortem on the dead body of Bijalbhai Devabhai Koli (accused's father) and Radhuben Maganbhai Bijalbhai (accused's wife) at around 1.20 during the mid-night of 11/2/1987. His post mortem reports exh. 8 and exh. 10 respectively with regard to deceased Bijalbhai Devabhai and Radhuben Maganbhai have been received in evidence in the oral testimony of Dr. Ramprasad Rasiklal Agrawal, exh.5

P.W. 2 Dr. Dahyabhai Shivrambhai Patel, Exh. 12 has been examined with regard to the blood group of the accused who was examined by him in Morbi Government Hospital.

P.W. 3 Dr. Jayantilal Karmashibhai Tanna, Exh. 16 has been examined for the purpose of having treated the accused who had sustained injuries of C.L.W. above right ear and swelling on the left hand. The witness has explained that the injuries could be caused by a fall on to the ground or as a result of some hard/blunt substance having struck the particular part of the body.

P.W. 4 Pranjivan Raghavji Aghara, Exh. 19 has been examined in respect of the sketch exh. 20 which was prepared for showing the situation of the houses and the respective places in the houses where the blood stains could be noticed.

P.W. 5 Ranjan, daughter of accused Maganbhai has been examined at Exh.22. She has not been administered oath as the Ld. Addl. Sessions Judge upon her examination at exh. 22A found that she was not knowing what would be the consequence of telling lies on oath. However, she has been examined upon the opinion of the Ld. Addl. Sessions Judge that she was competent to give evidence without administering oath. It appears that she has turned hostile. However, her evidence would need consideration while dealing with the arguments of the learned advocate rendering assistance to the cause of the accused.

P.W. 6 Vaghaji Bijalbhai has been examined at exh. 23. He has turned hostile.

P.W. 7 Lilaben, wife of Mansukhbhai Bijalbhai has been examined at exh. 24, who has turned hostile.

P.W. 8 Ghogho alias Khoda, son of the accused Maganbhai, another child witness, has been examined at exh. 25, after recording his statement at exh.25A and without administering oath to him.

P.W. 9 Dhirubhai Birambhai, exh. 26 has also turned hostile.

P.W. 10 Hemiben, daughter of Vaghji and wife of Bijalbhai has been examined at exh. 27. She has turned hostile to the prosecution.

With list exh. 28 inquest Panchnama Exhs. 32

and 33 respectively with regard to the dead bodies of Bijalbhai Devabhai Koli and Radhuben, wife of Maganbhai Koli have been placed in evidence.

Exh. 29 is the Panchnama of injured child witness Ranjanben, daughter of the accused Maganbhai Bijalbhai Koli.

Exh. 30 is the Panchnama with regard to clothes of the deceased Bijalbhai and Radhuben.

Exh. 31 is the Panchnama of the accused and his clothes.

P.W. 11 Champaben, wife of Dhirubhai Narashibhai has been examined at exh. 34.

P.W. 12 Jayeshkumar Manharlal has been examined at exh. 35. He is the Panch witness to Panchnama exh. 36 and discovery Panchnama exh. 37.

P.W. 13 Osman Alarakha is one of the two witnesses before whom the accused rendered extra-judicial confession. He has been examined at exh. 38.

P.W. 14 Rahematben Osmanbhai, exh. 39 is second such witness.

The injury certificate in so far as the accused is concerned appeared at exh. 40A with communication in that regard at exh. 41.

P.W. 15 Mavjibhai Becharbhai has been examined at exh. 42. He has turned hostile to the prosecution.

P.W. 16 Vinodkumar Parshotamdas, exh. 43 has acted as the messenger for sending the Muddamal articles to the Chemical Analyser at Junagadh. Reciprocal communications in that regard appeared at exhs. 45 and 46.

P.W. 17 Sagram Naranbhai, exh. 48 happened to be the police head constable at Tankara Police Station and has been examined with regard to Panchnama exh. 30.

Similar is the witness P.W. 18 Mansur Momaiya who happened to be the police constable in the aforesaid police station. He has been examined at exh.49.

P.W. 19 Rameshkumar Maganlal, exh. 50 happened to be the police constable in the outpost under Tankara Police Station. He had the occasion to take the dead bodies for post mortem and to entrust the same to their relatives after post mortem was performed.

P.W. 20 Dalpatsinh Himatsinh Rathod, exh. 51 is the Investigating Officer.

Exh. 54 is the report of Incharge Senior Scientific Assistant Chemical Examiner to the Government. Exh. 55 is the report of serological examination of the samples.

Exh. 57 is the report from Forensic Science Laboratory (Department of Physics).]

7. From the aforesaid evidence Mr. Budhbhatti

commented upon the evidence of child witness Ranjanben Maganbhai P.W. 5 exh. 22, accused's brother Vaghji Bijalbhai P.W. 6 exh. 23, P.W. 13 Osmanbhai Allarakha exh.38 and P.W. 14 Rahematben Osmanbhai exh.39. He also read the evidence of another child witness Ghogho alias Khoda, son of the accused appearing at exh. 25. His submission from the reading of the aforesaid pieces of evidence has been to the effect that the complainant and the child witnesses have turned hostile to the prosecution and, therefore, there is no substantive ebidence which would lend support to the prosecution case. He, therefore, submitted that evidence of extra-judicial confession stated to have been made by the accused before witnesses Osmanbhai and Rahematben would be only evidence on which some deliberation can be made. He submitted that in the absence of any independent corroboration or in the absence of any substantive piece of evidence oral evidence of Osmanbhai and Rahematben cannot be said to be sufficient to sustain conviction of the accused. He read before us a couple of decisions of this Court in the case of Shantuben vs. State of Gujarat reported in 1996 (1) 37 (1) G.L.R. p. 263 and Vasantben Labhubhai vs. State of Gujarat reported in the same volume at page 618. A Division Bench of this Court in Shantuben's case (supra) has observed that it is too well-known to be emphasised that extra-judicial confession standing by itself is the weakest type of evidence and it would be hazardous to act upon the same in the absence of some independent corroboration. Another Division Bench in Vasantben's case (supra) voiced the same expression. This Court, in State of Gujarat vs. Jugrajjia G. in Criminal Appeal No. 990 of 1984 with Criminal Revision Application No. 291 of 1984 decided on 09-14/03/2000 had an occasion to deal with the submissions of Mr. K.C. Shah, Ld. APP emanating from another decision of this Court in the case of Koli Ramsing Gandabhai v. State reported in 39 (1) 1998 (1) G.L.R. at page 116. While setting aside the conviction and sentence of the appellant in that case u/Ss. 302 and 201 of the IPC the Bench speaking through J.M. Panchal, J. has succinctly outlined the position of law attending extra judicial confession as under :-

" .... As the whole case of the prosecution is dependent on extra-judicial confession, it would be worthwhile to notice law on the subject. The word "confession" has not been defined in Evidence Act, 1872. A confession is an admission made at any time by a person charged with crime stating that he committed the crime. Confessions can be broadly classified in two categories,

namely, judicial confessions and extra-judicial confessions. Judicial confessions are those which are made before a Magistrate or in Court in the due course of legal proceedings. A confession which is neither made to a Magistrate nor in the course of legal proceedings is described as an extra-judicial confession. It is a free and voluntary confession of guilt made by a person accused of a crime in the course of conversation with person other than a Judge or Magistrate seized of the charge against him. Thus, extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or in Court. It embrances not only express confession of crime, but also those admissions and acts of the accused from which his guilt may be implied. An extra-judicial confession made to one who is not a person in authority and which is free from any suspicion as to its voluntary character and has also a ring of truth in it, is admissible in evidence against the accused and can be acted upon. Before the Court will act on extra-judicial confession, the circumstances under which the confession is made, the manner in which it is made, the prson to whom it is made, should be considered. Though extra-judicial confession appears to have been treated as a weak piece of evidence, there is no rule of law nor rule of prudence that it cannot be acted upon unless corroborated. It is not open to any Court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstance, time when the confession was made and credibility of the witness who speaks about such confession. It is true that in case of extra-judicial confession, Court requires the witness to give actual words used by the accused as nearly as possible, but it is not an invariable rule that Court should not accept the evidence, if not the actual words, but the substance were given. It is well settled that extra-judicial confession, particularly when not recorded, must be substantially proved by evidence. Extra-judicial confession should be proved in the same way as other admission or statements, by evidence of persons to whom they are made. They must be proved by evidence of the most reliable character. The value to be attached to an extra-judicial confession depends upon the reliability of the person to whom it is

made, interval between the occurrence and making of confession, reproduction of words used by the accused and the follow up action. It is for the Court having regard to credibility of the witness, his capacity to understand confession made by the accused etc. to accept the evidence or not. Ultimately, it would all depend upon the facts of each case."

To the aforesaid proposition we also hasten to add that a retracted extra-judicial confession, though a piece of evidence on which reliance can be placed, has to be corroborated by independent evidence. For that purpose we refer to Shambhu Singh v. State of U.P. reported in AIR 1994 S.C. 1594.

8. In the above background of the legal position qua extra-judicial confession it would now be appropriate to deal with the evidence of the aforesaid two witnesses Osmanbhai Allarakha exh. 38 and Rahematben Osmanbhai exh.39 in the first instance. It might be noted that these witnesses have supported the prosecution. It might also be noted that no enmity as between the accused on one side and these witnesses on the other side has been suggested in the cross-examination of either of the two witnesses. As a matter of fact, Osmanbhai is shown to be serving in the same Department where the accused is also shown to be serving at the relevant point of time. These circumstances will have to be borne in mind while appreciating the evidence of these witnesses.

9. Osmanbhai Allarakha has deposed that on the day of incident the accused reached his home during the afternoon hours ( ) and he was bleeding from his hand. At that time his wife Rahematben was also present. The accused told him that he committed two murders and that he should be given shelter "

Upon being asked about the particulars, he replied that he committed murders of his wife and his father. The witness, therefore, refused to give him shelter. The accused got enraged and hurled a stone which injured the witness on his head. The witness, therefore, applied tea powder on the wound. He went for his treatment in the Government hospital. In his explanation taken by the prosecution he has deposed that the accused informed him that he killed his wife and father by inflicting knife blows ( )

In his cross-examination he admitted that he did not file any complaint with regard to he having been injured as a result of hurling of stone by the accused on him. Upon being asked about the time when the accused went to his home, he replied that it was around 12 noon when the accused reached his nome and he remained there for about 10 minutes. P.W. 14 Rahematben Osmanbhai's evidence is almost of similar tenor. Upon reading of this evidence Ld. Advocate Mr. Budhbhatti submitted that there is a discrepancy with regard to the time of occurrence as deposed to by the other witnesses and as appearing in the complaint on one side and as deposed to by these witnesses. There is a difference of around one hour. He, therefore, submitted that the evidence of these two witnesses should not be relied upon. It might be noted upon appreciation of evidence of both the witnesses as a whole that they did not shape out before the Court with exact timings. They in fact testified the time of accused having gone to their house to be noon time. Under such circumstances, when they were required to say the exact timings in the cross-examination, it would be quite natural for them to refer to 12.00 O'clock rather than 1.00 O'clock or 2.00 O'clock in the afternoon. Such a discrepancy, in our considered opinion, would have little impact upon the overall evidence of these witnesses. It has then been submitted that there is some variation with regard to utterance of actual words by these witnesses. In fact utterance of actual words do appear almost in the similar pattern, but the utterance of exact words might differ. For example use of the words such as 'killing of wife', 'killing of father' and 'killing with the aid of knife', would clearly appear to be consistent in the matter of words spoken by the accused before these witnesses. The witnesses have also remained consistent with regard to the accused having hurled stone injuring the witness Osmanbhai Allarakha on his head. Bearing in mind the fact that it would be quite natural for the accused to go to some person known to him after having committed murders of his nearest ones and Osmanbhai being the person serving in the same Department and available in the vicinity, it was quite obvious for the accused to go to his place seeking shelter. However, as stated above it has to be found out whether there is any corroboration from other pieces of evidence and the circumstances flowing therefrom.

10. We would first revert to the evidence of child witness Ranjanben Maganbhai, daughter of the accused, exh. 22 and Ghogho alias Khoda, son of the accused Maganbhai, exh. 25. It is no-doubt true that both the witnesses turned hostile to the prosecution. But then in

the light of broad propositions of law concerning child witnesses, their evidence will need scrutiny. It is well settled that a child witness could often be accepted to give out a true version because of his innocence, but there would be danger in accepting evidence of such a witness that he or she might have been under influence or under coaching to give out a desired version. Therefore, two aspects will have to be borne in mind - one is innocence on the part of such child witnesses and another is influence which can easily be exerted on them. Bearing these two aspects in mind evidence of Ranjanben, daughter of accused Maganbhai exh. 22 might first be seen. At first she has deposed contrary to the earlier version which she gave out before the I.O. Will that not be under the immediate influence of elderly ones who might at the relevant point of time see to the accused being taken out of the possibility of being convicted ? This would appear from the statement of facts which this witness has made in the cross-examination of the Ld. APP. Following statements of facts given out by the witness accordingly will run counter to the hostile statements of facts given out by her in the rest of the part of her evidence. She has stated that in the exercise of snatching away the knife by her father, she was hurt on fingers of her right hand and that she went out screaming. Her brother Ghogha also shouted and called her uncle Vaghjibhai. By the time her uncle Vaghjibhai reached there, her father had already given 2 to 3 knife blows to her mother. When her grand-father Bijalbhai reached near the door of her house, her father assaulted him and gave knife blow on his stomach. Her grand-father immediately fell down. When her uncle Vaghjibhai tried to intercept and catch hold of her father, he had shown knife to him and escaped running away from the rear portion of the house towards the field on the side of the river. In our considered opinion, these statements of facts which run counter to the other part of the evidence would indicate not only the innocence on the part of the girl, but also a true picture of what must have happened. She appears to have not been able to withstand falsehood.

Child witness Ghogho alias Khoda has also turned hostile to the prosecution. But he has admitted that he was at home with his sister Ranjanben, Chako, Jashi, Ragho and Dinesh sitting outside the house. Now this statement of fact runs counter to the other statements of facts given out in the hostile version of the evidence where the witness has pleaded ignorance of the facts including facts with regard to he being present at home. It may be said that if these were the only pieces of

evidence possibly conviction might not have seen the light of the day. But then aforesaid statements of facts appearing in the evidence of both these child witnesses do render corroboration to the evidence of the witnesses Osmanbhai and Rahematben and would tend to show the correctness of the prosecution story as aforesaid.

11. Mr. K.C. Shah, Ld. APP referred to the medical evidence and the injuries noted in the post mortem reports. He also referred to the Muddamal articles stained with blood including Muddamal knife referring to the discovery Panchnama as aforesaid. He finally relied upon the Scientific report more particularly the serology report exh. 52. Find of human blood more particularly the blood which matched with the blood group of accused as well as his wife Radhuben, since deceased, the nature of injuries and the injury on the person of the accused, are the circumstances which go to corroborate the prosecution version as flowing from the evidence of Osmanbhai and Rahematben. Although Mr. Budhbhatti quite strenuously argued in canvassing cause of the accused, it was not possible for him to explain how blood stains in the residential house of the accused could appear and that too in broad day light. There is no pointer at any body else. It is true that there is some variation of appearance of blood at the particular places in the residential hosue of the accused. But then this discrepancy is apparently minor in nature. If the incident as shown to have occurred is visualised, it might be noted that first there is a quarrel between the husband and the wife, then there is infliction of knife blows by the accused upon his wife, then there is interception and counter action on the part of the accused's father Bijalbhai, then there is another assault with knife by the accused on his father Bijalbhai and then there is giving of knife blows on accused's father Bijalbhai. Possibility of appearance of blood at two different places cannot be ruled out. At the same time both the places are referable to the house of the accused and the nearby house of the father.

11. It would therefore, be clear that evidence of extra-judicial confession made by the accused soon after the incident to witnesses Osmanbhai exh. 38 and Rahematben exh. 39 stands amply corroborated from other pieces of evidence and that clearly brings home the guilt of the accused beyond reasonable doubt.

12. Having thus gone through the evidence adduced before the trial Court and having heard the learned advocate for the accused and the Ld. APP, we are of the

considered opinion that the ultimate finding and conclusion rendered by the Ld. Addl. Sessions Judge remains unassailable. [It is a different matter that the accused has been set at liberty as aforesaid. However, in the facts of the case his conviction and sentence will have to stand.]

In the result, this appeal is dismissed.

* * *

PVR.